

## **Abdulwahab (Migration) [2018] AATA 1889 (5 April 2018)**

### **DECISION RECORD**

**DIVISION:** Migration & Refugee Division

**REVIEW APPLICANT:** Ms Randala ABDULWAHAB

**VISA APPLICANT:** Mr Mohamad NAMRO

**CASE NUMBER:** 1612968

**DIBP REFERENCE(S):** OSF2016/014745

**MEMBER:** Shane Lucas

**DATE:** 5 April 2018

**PLACE OF DECISION:** Melbourne

**DECISION:** The Tribunal remits the application for a Partner (Provisional) (Class UF) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa:

- cl.309.211 of Schedule 2 to the Regulations; and
- cls.309.221 and 309.223 of Schedule 2 to the Regulations.
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- Statement made on 05 April 2018 at 1:12pm

### **CATCHWORDS**

Migration – Partner (Provisional) (Class UF) visa - subclass 309 – Sufficient evidence of genuine and continuing relationship – Definition of ‘Spouse’ – Decision under review remitted

### **LEGISLATION**

*Migration Act 1958*, s 5F, 65

*Migration Regulations 1994*, r 1.15A, Schedule 2, cls 309.211, 309.221, 309.223

## **STATEMENT OF DECISION AND REASONS**

### **APPLICATION FOR REVIEW**

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 8 August 2016 to refuse to grant the visa applicant a Partner (Provisional) (Class UF) visa under s.65 of the *Migration Act 1958* (the Act).
2. The visa applicant is a Palestinian national born in Kuwait on 1 February 1985. He formerly resided in Lebanon, but has resided in Jordan for some six months, having registered as a resident with the Jordanian Ministry of Interior Residence and Borders on 20 September 2017. He applied for the visa on 26 April 2016 on the basis of his relationship with the sponsor ("the review applicant"). At that time, Class UF contained only one subclass: Subclass 309 (Partner (Provisional)). The criteria for the grant of this visa are set out in Part 309 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Relevantly to this matter, the primary criteria include cls.309.211, 309.221 and 309.223.
3. The delegate refused to grant the visa on the basis that the visa applicant did not meet the requirements of cls.309.211 and 309.221 of the Regulations, as the delegate was not satisfied that the visa applicant was in a genuine and continuing relationship with the sponsor. The delegate considered that the information and evidence submitted in support of the application was not sufficient to demonstrate that the applicant was the spouse of the sponsor, as defined under s.5F of the Act. In particular, the delegate gave substantial weight to stated concerns about the nature of the persons' commitment to each other.
4. The review applicant seeks review of the delegate's decision.
5. The review applicant appeared before the Tribunal on 4 April 2018 to give evidence and present arguments. The visa applicant and an additional two witnesses (being brothers of the review applicant) made themselves available to give oral evidence to the Tribunal. The visa applicant and the additional witnesses had previously provided the Tribunal with Statutory Declarations regarding the genuine and continuing nature of the relationship between the parties. Accordingly, the Tribunal determined that it was not necessary to take oral evidence from the visa applicant or the additional witnesses.
6. The review applicant was not represented in relation to the review by a registered migration agent.
7. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

### **CONSIDERATION OF CLAIMS AND EVIDENCE**

8. The issues in the present case are whether the visa applicant was the sponsor's spouse for the purposes of the Act at the time of application (cl.309.211); whether at the time of decision, the visa applicant continues to satisfy the criterion in cl.309.211 (cl.309.221); and whether at the time of decision, the visa applicant continues to be the spouse of the sponsor (cl.309.223).

#### **Relevant law**

9. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must

be married to each other under a marriage that is valid for the purposes of the Act; there must be a mutual commitment to a shared life as a married couple to the exclusion of all others; the relationship must be genuine and continuing; and the couple must live together or not live separately and apart on a permanent basis [s.5F(2)(a)-(d)]. In forming an opinion about these matters, regard must be had to all the circumstances of the relationship. This includes evidence of the financial and social aspects, the nature of the parties' household, and their commitment to each other as set out in r.1.15A(3).

#### **Are the parties validly married?**

10. If the parties are validly married, they may meet the requirements of a spousal relationship. The applicants provided the Tribunal with a certified copy and translation of the marriage contract showing the marriage was made before a Sunni Religious Court in Tripoli, Lebanon on 10 February 2016; and a certified copy and translation of the marriage certificate, executed by the Ministry of the Interior in Tripoli, Lebanon on 23 February 2016. There is nothing to suggest the marriage is not valid. The Tribunal is satisfied on the evidence that the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

#### **Whether the parties are in a spouse or de facto relationship**

11. Clauses 309.211 and 309.221 require that at the time the visa application was made, and at the time of this decision, the visa applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case, the visa applicant claims to be the spouse of the review applicant. The parties provided documentation attesting that the review applicant (born in Lebanon on 2 February 1978) became an Australian citizen on 12 December 2000. Accordingly, the review applicant satisfies the requirements of cl.309.211(2)(a).

#### **12. Are the other requirements for a spousal relationship met?**

13. The applicants provided documentation to the Tribunal that was not available to the delegate. The Tribunal also had the benefit of hearing oral evidence from the review applicant and found her to be frank and credible.

#### **14. Financial aspects of the relationship**

15. The review applicant provided documentation and gave oral evidence detailing the financial aspects of the relationship. The review applicant stated that the couple do not presently have a joint bank account and do not pool their financial resources for the purposes of meeting their day-to-day household expenses as they reside in separate countries. In a written statement to the Tribunal, the visa applicant expanded on this issue, stating:

16. *"As a genuine husband and wife we help each other financially and money is not our main concern, our marriage and our relationship is more important, for example my wife paid the visa application fee at the Australian Embassy in Beirut by paying using her card and the cost of shipping for the application papers from Australia to Lebanon and AAT application my wife paid and I pay when I get chance as an example when my wife buy something for herself and I am with her I like to pay, because we think that we are one."*

17. The review applicant also provided documentation and gave oral evidence attesting that the couple shared the cost of expenses for accommodation, meals and activities during her visits to Lebanon in February-March 2016 and January-February 2017, and during a holiday together in Malaysia in September 2016. The review applicant stated also that since the visa

applicant relocated to Jordan in September 2017, he has lived with his parents and is not financially dependent on her. The review applicant also stated that the visa applicant has refused offers she has made of financial assistance as he regards accepting money from her as inconsistent with his role as a husband. The review applicant stated that prior to leaving Lebanon the visa applicant has consistently worked and is presently seeking employment in Jordan. In a written statement to the Tribunal, the visa applicant affirmed this, stating:

18. *“Currently I am not working but I am looking for a job and I still live with my parents so I don’t need to pay for rent or meals, and the savings I had came good now and my wife offered to send money for me but refused because as a man I am the one who suppose[d] to be working and that’s what I will do when I arrive in Australia, then we discussed about she can pay for hotels and her travel tickets and I use my savings for the time of being.”*

19. On consideration of the evidence, the Tribunal acknowledges that the parties have shared some day-to-day expenses; however the Tribunal found no evidence that the parties have pooled their financial resources in a substantive way or in relation to major financial commitments. Moreover, the Tribunal found no evidence of any joint ownership of real estate or other major assets or any joint liabilities. The Tribunal also found no evidence that either party owes any legal obligation in respect of the other. Given the constraints of residing in separate countries however, the Tribunal accords little weight to these criteria in this case.

**20. Nature of the household**

21. The Tribunal received documentation and oral evidence stating that the couple first met on social occasions within the Palestinian community of El Mina, Lebanon during the review applicant’s visits in June-September 2005 and November-December 2007. In her oral evidence, the review applicant stated that the Palestinian community of El Mina is close-knit and that her family and the visa applicant’s family are well known to each other. In written statements, the applicants stated that their relationship developed slowly over a period of several years through engagement on a variety of social media platforms, and with the support and encouragement of their respective families. The review applicant travelled to Lebanon on 1 February 2016 with the intention of marrying the visa applicant, and accordingly accepted his proposal of marriage on 8 February 2016. The marriage was subsequently performed before the Sunni Religious Court in Tripoli on 10 February 2016 and the review applicant’s brother hosted a small wedding celebration at his home that evening.
22. Since their marriage, the couple have resided together on three separate occasions: for some three weeks after their wedding in February 2016; for ten days during their holiday in Malaysia in September 2016; and for a further two weeks in Lebanon in January-February 2017. The review applicant provided documentation regarding the couple’s stays in hotels in Lebanon and Malaysia at these times, and gave oral evidence that the couple also resided for a time at her brother’s home in El Mina.
23. On consideration of the evidence, the Tribunal found some evidence attesting to the living arrangements of the persons during their limited time together. The Tribunal found no evidence however of the sharing of responsibility for housework, given that the couple have resided in hotels or in the review applicant’s brother’s home at these times. The Tribunal found no evidence of joint responsibility for the care and support of children. Given the constraints of residing in separate countries however, the Tribunal accords little weight to these criteria in this case.

**24. Social aspects of the relationship**

25. The Tribunal received detailed and credible written statements and Statutory Declarations regarding the development and genuine and continuing nature of the relationship from both applicants, and from multiple members of their respective families and friendship networks in Lebanon and Australia. The Tribunal also received a wealth of photographic evidence showing the couple – together and/or in the company of others – engaging in social activities with members of their respective families and friendship networks in Lebanon. The photographs depicted the couple at a range of formal and informal occasions, including their wedding celebration in February 2016 and a one-year anniversary celebration in February 2017. The Tribunal also received photographic evidence and other documentation regarding the couple's holiday together in Malaysia in September 2016. These photographs appear spontaneous and casual, and show the couple engaging in social and recreational activities at various tourist destinations in Kuala Lumpur.
26. On consideration of the evidence before it, the Tribunal is satisfied that the persons represent themselves to other people as being married to each other, and that the couple's family members and friends regard the relationship as a genuine and continuing one. The Tribunal is also satisfied that the couple plan and undertake joint social activities within the constraints of principally residing in separate countries.

**27. Nature of the person's commitment to each other**

28. As stated above, the couple claim to have met on one or more occasions in 2005 and 2007 through the extended family and social network within the Palestinian community in El Mina. Their personal relationship developed slowly over a period of years, principally through engagement on social media, and with the encouragement and support of their respective families. In his written statement, the visa applicant explained the development of the couple's relationship thus:

*29. "In Lebanon our families were friends and neighbours before they [the review applicant and her parents] travel to Australia. We meet in 2005 and again 2007 when she [the review applicant] came to Lebanon for holiday. After 2007 we start talking every now and then however 2012 we started talking to each other more often. Our communication continued until 2014 we started talking with each other on daily basis. I felt attracted to her and felt very comfortable talking to her. Our communication continued, especially within the Internet which has been greatly enhanced by Whatsapp, Viber and Skype."*

30. After their marriage in February 2016, the couple resided together in hotels and at the review applicant's brother's home. In September 2016, the couple travelled together to Malaysia for a holiday, during which time the review applicant fell pregnant. On her return to Australia however, the review applicant miscarried. The Tribunal was provided with documentation from Moreland Medical Centre in Coburg, Victoria and from the Royal Women's Hospital in Parkville, Victoria detailing the circumstances of the miscarriage on 14 October 2016. In oral evidence, the review applicant affirmed that she became pregnant during the couple's holiday in Malaysia and that the visa applicant was a significant source of emotional support to her after the miscarriage. In her written statement to the Tribunal, the review applicant expanded on this claim:

*31. "I came from Malaysia pregnant but soon after I had a miscarriage and this was also very difficult because we are not with each other, again my husband and I supported each other emotionally even with the distance."*

32. The Tribunal also received documentation and oral evidence attesting to the couple's regular communication in the two years since their marriage. The review applicant stated that the majority of their contact in recent months has been through FaceTime and that they discuss

both the minutiae of their daily lives and the prospect of a future life together in Australia. The visa applicant also spends some FaceTime building his relationship with the review applicant's sixteen year old son. In oral evidence, the review applicant described her first marriage – which ended in divorce in 2005 – as an abusive relationship, and stated that her ex-husband has no ongoing contact with their son. Accordingly, the review applicant stated that it is very important to her that her marriage to the visa applicant is successful:

33. *“I am a kind of person who is sensitive and serious about relationships that's why I waited this long since my divorce to find a man who I believe that the relationship between us will continue and a man who I can trust and feel secure and who I believe that he really loves me and my son.”*

34. The parties have now been married for over two years and have lived together as spouses (and are not living separately and apart on a permanent basis) on three occasions in that time, notwithstanding the constraints of principally residing in separate countries. In oral and written evidence, the couple spoke knowledgeably and credibly about the inception of their relationship; the development of the relationship over time; the significant emotional support they provide to each other while apart through their regular communication on FaceTime and other social media platforms; and their practical and aspirational plans for a future together. In response to questions from the Tribunal, the review applicant also spoke of the couple's intention to try again for a successful pregnancy and to have children together.
35. Upon considering the evidence, the Tribunal accepts that the relationship between the couple has evolved over several years; that the couple has been married for over two years; and that the couple has lived together on three occasions over the course of that time, notwithstanding the constraints of principally residing in separate countries. The Tribunal is also satisfied that the couple draw on each other to a significant degree for companionship and emotional support, and that they view their relationship as being long term.
36. Having regard to all the circumstances of the relationship, the Tribunal is satisfied that when the application was made and at the time of this decision, the visa applicant and the review applicant had a mutual commitment to a shared life to the exclusion of others. The Tribunal is satisfied their relationship is genuine and continuing. The Tribunal is satisfied that the visa applicant and sponsor have lived together (and are not living separately and apart on a permanent basis) and have a shared commitment to a future as a married couple.
37. On the basis of the above, the Tribunal is satisfied that the requirements of s.5F(2) are met at the time the visa application was made and at the time of this decision. Therefore the visa applicant meets cls.309.211(2)(a), 309.221 and 309.223.

38. **Conclusion**

39. Given the findings above, the appropriate course is to remit the application for a visa to the Minister to consider the remaining criteria for grant of a Subclass 309 visa.

**DECISION**

40. The Tribunal remits the application for a Partner (Provisional) (Class UF) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa:
- cl.309.211 of Schedule 2 to the Regulations; and
  - cls.309.221 and 309.223 of Schedule 2 to the Regulations.

Shane Lucas  
Member

## **ATTACHMENT - Extract from Migration Regulations 1994**

### **1.15A Spouse**

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
  - (a) a Partner (Migrant) (Class BC) visa; or
  - (b) a Partner (Provisional) (Class UF) visa; or
  - (c) a Partner (Residence) (Class BS) visa; or
  - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
  - (a) the financial aspects of the relationship, including:
    - (i) any joint ownership of real estate or other major assets; and
    - (ii) any joint liabilities; and
    - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
    - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
    - (v) the basis of any sharing of day-to-day household expenses; and
  - (b) the nature of the household, including:
    - (i) any joint responsibility for the care and support of children; and
    - (ii) the living arrangements of the persons; and
    - (iii) any sharing of the responsibility for housework; and
  - (c) the social aspects of the relationship, including:
    - (i) whether the persons represent themselves to other people as being married to each other; and
    - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
    - (iii) any basis on which the persons plan and undertake joint social activities; and
  - (d) the nature of the persons' commitment to each other, including:
    - (i) the duration of the relationship; and
    - (ii) the length of time during which the persons have lived together; and
    - (iii) the degree of companionship and emotional support that the persons draw from each other; and
    - (iv) whether the persons see the relationship as a long-term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).